LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 522

JULIUS RANNY RAGAN, PETITIONER,

vs.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1949.

CERTIORARI GRANTED FEBRUARY 28, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 522

JULIUS RANNY RAGAN, PETITIONER,

vs.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., Tenth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., District of Kansas	1	1
Caption (omitted in printing)	1	
Petition	1	1
Summons	4	4
Return on service of writ	5	4
Answer of Clarence M. Trent (statement)	5	5
Motion to quash service of summons	5	5
Amended answer of Clarence M. Trent (statement)	6	5
Alias summons	6	5
Return on service of writ	7	6
Motion to quash service of alias summons	7	6
Motion to amend return of service	8	7
Motion to amend return of service of alias summons	9	8
Portions of record of proceedings, February 5, 1946:		
Testimony of C. A. Burnett	10	9
R. H. Campbell	12	11
R. H. Campbell (recalled)	14	11
Clarence M. Trent	13	11
Mrs. C. M. Trent	14	12

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 10, 1949.

Record from D. C. U. S., District of Kansas—Continued	Original	Print
Findings of fact and conclusions of law on motions to quash service of summonses and motions to amend returns on service of summons	14	13
Minute entry, April 19, 1946, sustaining motions to amend returns on service of summonses	18	16
Motion for new trial (statement)	18	16
Answer of Merchants Transfer & Warehouse Company, Inc.	18	17
Minute entry, May 14, 1946, denying motion for new trial	22	19
Portions of proceedings of pre-trial conference	22	20
Motion for summary judgment, filed June 19, 1946	23	21
Motion to strike parts of answer	24	21
Order denying motion for summary judgment and sustaining motion to strike parts of answer	24	22
Memorandum opinion, Mellott, J.	24	22
Motion for summary judgment, filed April 21, 1947	28	25
Memorandum opinion and order, Mellott, J.	28	26
Amendment to answer (statement)	30	28
Verdict	31	28
Judgment	31	28
Motion for new trial	33	30
Motion to vacate judgment and enter judgment for defendant (statement)	34	31
Motion for leave to file motion to vacate judgment for defendant (statement)	34	31
Motion for leave to file motion to vacate order sustaining motions to quash services of summonses (statement)	34	31
Order overruling motion for new trial, etc.	34	31
Notice of appeal of Merchants Transfer & Warehouse Company, Inc.	36	33
Appeal bond (statement)	37	33
Plaintiff's notice of appeal	37	33
Appeal bond (statement)	37	34
Statement of points relied on (Merchants Transfer & Warehouse Company, Inc.)	37	35
Plaintiff's statement of points relied on	38	35
Clerk's certificate (omitted in printing)	39	
Record entry: Cause argued and submitted	41	36
Opinion, Huxman, J.	41	36
Judgment	51	45
Order extending time for petition for rehearing (statement)	51	45
Petition for rehearing	51	45
Order denying petition for rehearing	53	47
Order staying mandate (statement)	53	47
Clerk's certificate (omitted in printing)	53	
Order allowing certiorari	55	47

[fol. a] [Captions omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

JULIUS RANNY RAGAN, Plaintiff,

vs.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., a Corporation, and Clarence M. Trent, d/b/a Trent Truck Lines, Defendants

No. 1509—Civil

PETITION FOR DAMAGES—Filed September 4, 1945

Comes now plaintiff and for his cause of action against the defendants alleges and states as follows:

1. That plaintiff is and was at all times mentioned herein a citizen and resident of Jackson County, Missouri, residing at 915 Charlotte Street, Kansas City, Missouri; that the defendant, Merchants Transfer & Warehouse Company, Inc., is and was at all times mentioned herein a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and at all times mentioned herein was and is a citizen and resident of Crawford County, Kansas, residing at 1201 North Broadway, Pittsburg; that the defendant, Clarence M. Trent, is and was at all times mentioned herein a citizen and resident of the State of Kansas, residing at Pittsburg, Kansas; that the matter and amount in controversy for which plaintiff seeks judgment exceeds the sum of $3,000.00 exclusive of interest and costs; that the controversy is wholly between [fol. 2] citizens and residents of different States, and that plaintiff and defendants in this cause are actually interested in said controversy.

2. That at all times mentioned herein Merchants Transfer & Warehouse Company, Inc. was the owner of a certain G. M. C. truck, and at all times mentioned herein one George Ogan was the agent and employee of the defendant, Merchants Transfer & Warehouse Company, Inc., and engaged within the scope of his employment.

3. That plaintiff is informed and believes and therefore alleges the fact to be that at some time subsequent to October 1, 1943, and prior to the filing of this petition defendant, Clarence M. Trent, purchased all of the assets, property and business of defendant, Merchants Transfer & Warehouse Company, Inc., and assumed and agreed to pay all the debts and obligations of said defendant, Merchants Transfer & Warehouse Company, Inc., and the said defendant, Clarence M. Trent, succeeded to all of the rights, assets, liabilities and obligations of said defendant, Merchants Transfer & Warehouse Co., Inc.

4. That on or about October 1, 1943, at about 6:15 o'clock P.M., plaintiff drove and operated a Buick automobile south on U. S. Highway No. 69; that said highway runs generally in a north and south direction; that proceeding south on said highway at a point approximately five miles north of Louisburg, Kansas, said highway curves approximately 90° to the west; that such curve is paved with concrete and is steeply banked; that at said time and place, as the automobile operated by plaintiff arrived at the north end of said curve, the defendants drove and operated said G. M. C. truck northerly on said highway out of said curve and negligently and carelessly drove and operated the left side of said truck into and against the left side of the Buick automobile driven by plaintiff, demolishing the left side of said Buick automobile, causing the left front tire thereon to blow out and causing said Buick automobile to swerve to the southerly side of said highway.

5. That at said time and place the defendants negligently and carelessly drove and operated said G. M. C. truck to [fol. 3] the left of the center of said highway; that at said time and place the defendants negligently and carelessly, while approaching the automobile driven by plaintiff and while operating said truck to the left of the center of said highway and in a northeasterly course which if maintained would have cleared plaintiff's automobile, suddenly and without warning changed the course of travel of said truck to the north, thereby causing the left front corner of the overhanging body of said truck to come into violent contact with the left side and left front of plaintiff's automobile; that defendants at said time and place failed and neglected to keep a good and careful lookout for other vehicles on said high-

way and particularly the vehicle operated by said plaintiff; that at said time and place the defendants negligently and carelessly drove and operated said G. M. C. truck upon the highway of the State of Kansas in violation of the laws of Kansas regulating the width, height and length of motor vehicles in that the width of the body of said truck was in excess of the maximum width permitted and allowed by the laws of the State of Kansas.

6. That as a direct and proximate result of the negligence of the defendants as aforesaid, the plaintiff's automobile was demolished, and he suffered the following painful and permanent injuries: His head, neck, face, arms, hands, torso and legs, and the skin, flesh, muscles, bones, tendons, nerves and blood vessels thereof were bruised, contused, lacerated, torn and fractured; that the skin, flesh, muscles, tendons, blood vessels, nerves and bones of his left arm were torn, cut, bruised, lacerated, mangled and fractured eventually necessitating the amputation of plaintiff's left arm at a point approximately three inches below the shoulder; that his left claviele was fractured and it will be necessary to remove plaintiff's entire shoulder. That he suffered a concussion of the brain, and a severe and lasting shock to his central nervous system, resulting in continued and continuous vomiting, nervousness, muscle-cramp, and the loss of weight from 198 pounds to 128 pounds. That the lower extremities of his body have been caused to swell on frequent occasions; that plaintiff has expended and in the future will be required to expend large sums for hospital and medical attention. All to plaintiff's damage in [fol. 4] the sum of Seventy-five Thousand ($75,000.00) Dollars.

That said Buick automobile owned by plaintiff and the body, chassis, motor and wheels thereof were wrenched, broken and battered, and said Buick automobile has been repaired at a cost of $666.48. That plaintiff was without the use of said automobile during the time it was being repaired for a period of three months, and that the reasonable value of the use of said automobile was $5.00 per day.

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of Seventy-six Thousand One Hundred Sixteen and forty-eight hundredths

($76,116.48) Dollars, together with all costs in this action accrued.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

In United States District Court

[Title omitted]

Summons

To the above named Defendants: Merchants Transfer & Warehouse Co., 1201 N. Broadway, Pittsburg, Kans., and Clarence M. Trent, d/b/a Trent Truck Lines, Pittsburg:

You are hereby summoned and required to file in the Office of the Clerk of the United States District Court at Fort Scott, Kansas, and serve upon Roach & Brenner, Attys., 712 Commerce Bldg., Kansas City, Missouri, and upon A. J. Herrod, Attorney, 428 Brotherhood Bldg., Kansas City, Kansas, plaintiff's attorneys, whose address is as given above, an answer to the complaint which is herewith served upon you, within 20 days after service to [fol. 5] this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Harry M. Washington, Clerk of Court; By Maxine Nightingale, Deputy Clerk. (Seal.)

Date: September 7th, 1945.

Return on Service of Writ—Filed September 27, 1945

I hereby certify and return, that on the 22nd day of Sept., 1945, I received the within summons at Wichita, Kansas and served The Merchants Transfer and Warehouse Company by delivering a true copy thereof to Clarence M. Trent personally.

Served Clarence M. Trent personally at Pittsburg, Kansas on Sept. 22, 1945.

At the same time and in like manner I served each of the within named with a copy *of* of the Petition for Damages filed in this case.

W. M. Lindsay, United States Marshal. By Repps. H. Campbell, Deputy U. S. Marshal.

(Answer of Clarence M. Trent, d/b/a Trent Truck Lines, was filed in the District Court October 10, 1945.)

In United States District Court

Motion to Quash—Filed October 12, 1945

Comes now The Merchants Transfer and Warehouse Company, a corporation, and appearing specially and for [fol. 6] the purpose of this motion only moves to quash any pretended service of summons and petition herein, if it is the intention of the plaintiff to have sued this defendant, for the reason that no service has been had upon this defendant as required by the Federal Rules of Civil Procedure.

Douglas Hudson, C. A. Burnett, Attorneys for the Merchants Transfer and Warehouse Company, a corporation.

(Amended Answer of Defendant, Clarence M. Trent, d/b/a Trent Truck Lines was filed in the District Court October 18, 1945.)

In United States District Court

[Title omitted]

Alias Summons

To the above named Defendant: Merchants Transfer & Warehouse Company, 1201 N. Bdwy., Pittsburg, Ks; (Mrs. G. L. Sterling, Sec-Treas., 503 S. Broadway, Pittsburg, Ks.)

You are hereby summoned and required to file in the Office of the Clerk of the United States District Court at Fort Scott, Kansas, and serve upon Roach & Brenner,

Attys., 712 Commerce Bldg., Kansas City, Missouri, and upon A. J. Herrod, Attorney, 428 Brotherhood Bldg., Kansas City, Kansas, plaintiff's attorneys, whose addresses are given above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken [fol. 7] against you for the relief demanded in the complaint.

Harry M. Washington, Clerk of Court. By Maxine Nightingale, Deputy Clerk. (Seal.)

Date: December 28th, 1945.

RETURN ON SERVICE OF WRIT—Filed January 7, 1946

I hereby certify and return, that on the 28th day of Dec., 1945, I received the within summons at Ft. Scott, Kansas and served The Merchants Transfer and Warehouse Company, Inc. a Corporation by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer Company, Inc. a Corporation at the hour of 5:45 P. M. at 503 South Broadway Street at Pittsburg, Kansas on December 28, 1945.

At the same time and in like manner I served the within named with a copy of the complaint filed in this case.

W. M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy U. S. Marshal.

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH—Filed January 17, 1946

Comes now The Merchants Transfer and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and appears specially for purpose of this motion only, and moves the Court to quash pretended service of summons upon it in the above entitled action made on December 28, 1945, and as grounds hereof states that the said summons was entitled as against some corporation by the name of "Mer- [fol. 8] chants Transfer & Warehouse Company, Inc.," a corporation, but was served upon Emma L. Sterling, who is

Secretary-Treasurer of this corporation, The Merchants Transfer and Warehouse Company. The said Emma L. Sterling is not an officer, agent or employee of the named defendant, "Merchants Transfer & Warehouse Company, Inc.," a corporation.

Douglas Hudson, Attorney for The Merchants Transfer and Warehouse Company, a corporation.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND RETURN OF SERVICE—Filed February 4, 1946

Comes now plaintiff and respectfully represents and shows to the Court as follows:

1. That on September 22, 1945, summons in the above styled case was duly and regularly served upon the defendant, Merchants Transfer & Warehouse Company, Inc.

2. That said defendant, Merchants Transfer & Warehouse Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and on said date, that is, September 22, 1945, the registered office of said corporation was 1201 North Broadway, Pittsburg, Kansas.

3. That on said date, that is, September 22, 1945, Clarence M. Trent was in charge of the registered office of said corporation at said address.

4. That on said date none of the officers of said corporation could be found.

Wherefore, plaintiff prays that the return of service be amended to recite and show that said summons was duly served upon the Merchants Transfer & Warehouse Company, Inc. by delivering a true copy thereof to Clarence M. Trent at the registered office of said corporation, 1201 North Broadway, Pittsburg, Kansas, said Clarence M. [fol. 9] Trent, being then and there in charge of said registered office, the officers of said corporation not being found.

A. J. Herrod, Cornelius Roach, D. L. Brenner, Attorneys for Plaintiff.

Rec'd copy this 4th day of Feb. 1946—Douglas Hudson, Atty. for Merchant Tsf. & Whse. Co.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND RETURN OF SERVICE OF ALIAS SUMMONS —Filed February 4, 1946

Comes now plaintiff and respectfully represents and shows to the Court as follows:

1. That alias summons to defendant, Merchants Transfer & Warehouse Company, Inc., in the above styled case was duly issued on December 28, 1945.

2. That said alias summons was duly and regularly served on defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer & Warehouse Company, Inc. on December 28, 1945.

3. That at the time of the service of said alias summons the President of said corporation was deceased, and said Mrs. G. L. Sterling was the only remaining officer of said corporation.

Wherefore, plaintiff prays that said return of service of said alias summons be amended to recite that the said Mrs. G. L. Sterling was the only surviving officer of said corporation.

A. J. Herrod, Cornelius Roach, D. L. Brenner, Attorneys for Plaintiff.

Recd. copy this 4th day of Feb., 1946—Douglas Hudson, Atty. for def, Merchants Tsf. & Whse. Co.

[fol. 10] IN UNITED STATES DISTRICT COURT

PORTIONS OF RECORD OF PROCEEDINGS HAD AT FORT SCOTT, KANSAS, FEBRUARY 5, 1946, BEFORE HON. EUGENE RICE, UNITED STATES JUDGE, IN NARRATIVE FORM—Filed February 4, 1948.

Mr. Cornelius Roach, attorney for the plaintiff, introduced in evidence the following exhibits, which were admitted by the Court:

Exhibit No. 1—A certified copy of designation of registered office and resident agent, which the Merchants Trans-

fer & Warehouse Company filed April 26, 1940, which designated the registered office as 1201 North Broadway, Pittsburg, Kansas.

Exhibit No. 2—A certified copy of annual report of the Merchants Transfer & Warehouse Company for the year ending December 31, 1943, which was filed June 10, 1944.

Exhibit No. 3—A certified copy of annual report of the Merchants Transfer & Warehouse Company for the year ending December 31, 1944, which annual report, although required in March, 1945, was not filed until December 31, 1945. In this annual report the address of the registered office is changed to Apartment A-2, Goatches Apartments, 503 South Broadway, and the resident agent is designated as Emma L. Sterling.

Testimony of C. A. Burnett.

Direct examination.

By Cornelius Roach:

My name is C. A. Burnett. My address is 204 National Bank Building, Pittsburg, Kansas. I am a lawyer. I represent the Merchants Transfer & Warehouse Company and the estate of G. L. Sterling, who was formerly president of that company. Mr. G. L. Sterling died July 19, 1942. Mrs. Emma L. Sterling, who is the same person as Mrs. G. L. Sterling, is the widow of G. L. Sterling.

Mrs. G. L. Sterling, or Emma L. Sterling, is a woman approximately 80 years of age, and my information is that [fol. 11] she hasn't been out of her apartment since about September 1, last year. I don't think she is bedfast. My understanding is she has been in poor health for some time. She was never what you would call an active manager of the Merchants Transfer & Warehouse Company. After Mr. Sterling's death I think she tried to run the company for a little while, but don't think she spent any time down at the place.

Here Mr. Roach introduced Plaintiff's Exhibit No. 4, which was identified as original minute book of the Merchants Transfer & Warehouse Company.

Mrs. Sterling was secretary and treasurer, and still is.

Here Mr. Roach, by referring to Exhibit No. 4, called

attention of the Court to the fact that there were no minutes of any meeting after January 11, 1940 until November, 1944, at which time of the meeting of the stockholders and board of directors resolutions were adopted, authorizing the sale of the remaining assets with exceptions to Mr. Trent, and a resolution adopted designating Mrs. G. L. Sterling as the resident agent and the registered office as Apartment A-2, Geatches Apartments, 503 South Broadway, Pittsburg, Kansas. This information appears at pages 29 and 30 of the minute book.

So far as I know, there was nothing filed with reference to any designation of change of resident agent with the Secretary of State until the annual report was filed near the last of the year, which annual report is Plaintiff's Exhibit No. 3.

Cross-examination.

By Mr. Douglas Hudson:

The witness identified Defendant's Exhibit No. 1 as a certified copy of the charter of the Merchants Transfer & Warehouse Company.

Mrs. G. L. Sterling has been secretary of the Merchants Transfer & Warehouse Company for some years. She is one of the persons that worked with me in the sale and transfer of property to Mr. Trent. At that time she was secretary-treasurer, and has continued so up to the present time. She was present September 22, 1945, in Pitts-
[fol. 12] burg, Kansas. In fact, she has been there continuously for the past several years.

I have been attorney for the Merchants Transfer & Warehouse Company since 1944 and before, beginning sometime after Mr. Sterling's death. During the time I have been connected with the Merchants, Clarence M. Trent has not at any time been connected as an officer, employee, agent, or stockholder or in any way with the Merchants Transfer & Warehouse Company.

From on or about November 13, 1944, the Merchants Transfer & Warehouse Company has not had any property of any kind or character or exercised any function in the building located at 1201 North Broadway.

Testimony of R. H. CAMPBELL.

Direct examination.

By Mr. Cornelius Roach:

My name is R. H. Campbell.

I am the Deputy Marshal for the District of Kansas, Third Division, located at Fort Scott. I received the summons in this case on or about September 22, 1945. I went to 1201 North Broadway, Pittsburg, Kansas. I entered the office and inquired if that was the Merchants Transfer & Warehouse Company. Mr. Trent and a lady was there. He said. "Well, no, it isn't." He said this was formerly their office but it isn't in existence any more. He said, "I don't know who the owners or officers are." He told me he had purchased the assets of the Merchants Transfer & Warehouse Company. As near as I recall now, I asked him if there were any officers of the Merchants Transfer & Warehouse Company around there and he said, "No." He said they were a couple of aged women and that he did not know where I could find them. He said, "I don't think they are in town." I asked if he was in charge of the office and he said yes, he was the only one.

[fol. 13] Testimony of CLARENCE M. TRENT.

Direct examination.

By Cornelius Roach:

My name is Clarence M. Trent. I live at Pittsburg, Kansas. I am sole owner of the truck company, Trent Truck Line. I have been in that business about five years.

I first occupied the premises at 1201 North Broadway on November 14, 1944. I own the truck line individually.

I have never been an employee or agent of the Merchants Transfer & Warehouse Company. On September 22, 1945 I was at 1201 North Broadway.

On September 22, 1945 I recall that two summons were left with me at 1201 North Broadway.

Cross-examination.

By Mr. Douglas Hudson:

Soon after November 15, 1944 the Merchants Transfer & Warehouse Company's telephone number went out of the book. I kept my old telephone number.

I did not buy the State Corporation Permit from Merchants Transfer & Warehouse Company. Their permit was cancelled, and I continued under the one I had as an individual. I just bought certain assets. I didn't buy the corporation. Since November 15, 1944, Merchants Transfer & Warehouse Company has not had any property of any kind or character located in the building at 1201 North Broadway. The corporation has not performed any function of any kind or character to my knowledge since on or about November 14, 1944.

At the time the summons was served on me, my wife was present.

The Marshal came in and stated his business. Upon the advice of P. E. Nulton, an attorney at Pittsburg whom I called, I told the Deputy Marshal I would accept service for myself. He said his instructions were to leave the other summons there and he was just going to leave it anyway. I knew where Mrs. Sterling was living at that time and that she was the resident agent of Merchants Transfer & Warehouse Company.

[fol. 14] Testimony of Mrs. C. M. Trent.

Direct examination.

By Mr. Douglas Hudson:

My name is Mrs. C. M. Trent. I have been in and about the place of business since my husband bought out certain property of the Merchants Transfer & Warehouse Company in November, 1944. Since 1944 Merchants Transfer & Warehouse Company has not had any property of any kind in or about that property. They have not performed any function of any kind as a corporation from that place since November, 1944.

When the Deputy Marshal came to serve the summons, Mr. Trent told him where Mrs. Sterling lived.

Testimony of R. H. CAMPBELL.

Direct examination.

By Mr. Roach:

I never heard the name of Mrs. Sterling mentioned while I was serving the summons on Trent. The first time I heard that name was when I received alias summons in December.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSION OF LAW ON MOTIONS TO QUASH SERVICE OF SUMMONS AND MOTIONS TO AMEND RETURNS ON SERVICE OF SUMMONS—Filed April 13, 1946

I

Suit was filed herein on September 4, 1945, against the named corporate defendant, Merchants Transfer and Warehouse Company, Inc., a corporation. On September 7, 1945, [fol. 15] summons was issued and placed in the hands of the United States Marshal, and on the 22nd day of September, 1945, a Deputy United States Marshal served the summons and made return thereof showing as follows: "I received the written summons at Wichita, Kansas, and served 'Merchants Transfer and Warehouse Company' by delivering a true copy thereof to Clarence M. Trent, personally." The return shows that the Deputy Marshal also at the same time served Clarence M. Trent personally by leaving him a true copy of the summons. A motion to quash was filed by "The Merchants Transfer and Warehouse Company." This motion to quash was filed on October 12, 1945. While the motion to quash was pending, the plaintiff issued an alias summons directed to the same named defendants. This summons was issued on December 28, 1945, and on December 28, 1945, the same Deputy Marshal made the following return: "I received the within summons at Fort Scott, Kansas, and served 'The Merchants Transfer and Warehouse Company, Inc., a corporation' by delivering a true copy thereof to Mrs. G. L. Sterling, personally; she being the Secretary and Treasurer of the Merchants Transfer and Warehouse Company, Inc., a corporation, at the home at 5:45 p. m. at 503 South Broadway Street, at Pittsburg,

Kansas, on December 28, 1945." Thereafter, the Merchants Transfer and Warehouse Company filed a motion to quash the pretended service of summons made on December 28, 1945; the basis of said motion being that the summons was directed to "Merchants Transfer and Warehouse Company, Inc."

II

The certificate of incorporation shows that the legal name of the defendant attempted to be sued is "The Merchants Transfer and Warehouse Company." G. L. Sterling was the first president of said corporation, and 1201 North Broadway, Pittsburg, Kansas, was the location of its registered office. G. L. Sterling was designated as the resident agent of said corporation. No certificate of change of registered office or resident office of said corporation has ever been filed with the proper official of the State of Kan- [fol. 16] sas. The minutes of the corporation, however, show that in November, 1944, a resolution was adopted by the Board of Directors purporting to change the resident agent and the location of the registered office of said corporation. G. L. Sterling had died in 1942. His wife, Mrs. G. L. Sterling, was the only surviving officer of the corporation. She was the Secretary and Treasurer of the corporation. By the resolution adopted in 1944, the Board of Directors designated Emma L. Sterling as the resident agent and changed the location of the registered office to 503 South Broadway Street, Pittsburg, Kansas. The proof shows that Emma L. Sterling is the same person as Mrs. G. L. Sterling. The proof further shows in the minutes of the corporation, the corporation is sometimes referred to as "The Merchants Transfer and Warehouse Company"; "Merchants Transfer and Warehouse Company, Inc."; and "The Merchants Transfer and Warehouse Company, Inc."

III

Some months prior to the 22nd day of September, 1945, the defendant Clarence M. Trent, doing business as Trent Truck Lines, bought the physical assets of the Merchants Transfer and Warehouse Company. His wife purchased the building in which the offices of said company had been located, and thereafter the Trent Truck Lines occupied said offices and operated their business therefrom. Trent was

not and never had been an officer or agent of the Merchants Transfer and Warehouse Company. Mrs. G. L. Sterling then resided at 503 South Broadway Street. On the 22nd day of September, 1945, the Deputy Marshal attempted to serve "Merchants Transfer and Warehouse Company, Inc., a corporation" by leaving a copy of summons and a copy of the complaint with Clarence M. Trent. Clarence M. Trent was in charge of the office then being conducted at 1201 North Broadway, Pittsburg, Kansas, but he was not in charge of said office for the Merchants Transfer and Warehouse Company. There is some dispute as to what was told the Deputy Marshal at the time the summons was left with Trent for the corporation. I find, however, that the Deputy Marshal inquired of Trent about the officers of the corporation and was informed that no officers of the corpo- [fol. 17] ration were present. When asked who the officers were Trent replied that they were a couple of aged women, whose address he was not able to give. Thereupon, the Deputy Marshal left the summons with Trent for the corporation. The Deputy Marshal did not know the address of Mrs. G. L. Sterling at that time. The motions to quash filed herein raised two questions as to the first summons, to-wit: (1) That the summons was not served upon any authorized agent of the corporation; and (2) That the summons was directed to a corporation other than the Merchants Transfer and Warehouse Company. This second contention is based upon the misnomer or difference in the names of the corporation as set forth in the complaint and the summons, and the corporation filing the motion.

Conclusions of Law

I

As to the first summons, the plaintiff is entitled to amend the return of service of said summons in conformity with the facts set forth above, but the Court concludes that after said return is amended to conform to the facts as set forth above that the motion to quash should be sustained. This for the reason that Trent was not an agent of the corporation, and the corporation was not at the time occupying the office at which the service was had.

II

As to the second summons, the plaintiff is entitled to amend the return of service of said summons to conform to the facts as set forth above. The motion to quash the return of the second service of summons is denied for the reason that the misdescription of the name of the corporation is immaterial. See Fletcher's Cyclopedia Corporations, Per. Ed. Volume 6, Paragraphs 2444 and 2447. The corporation actually sought to be sued herein was served, and the corporation was not in any particular misled. The omission of the word "the" at the beginning of the name, and the inclusion of the abbreviation "Inc." are immaterial.

[fol. 18] The attorney for the plaintiff may prepare appropriate Order in conformity with the foregoing Findings of Fact and Conclusions of Law and present the same for filing and entry at Fort Scott, Kansas, at 10:00 a.m. on the 19th day of April, 1946.

Dated this 12th day of April, 1946.

Eugene Rice, United States District Judge, Assigned to Dist. of Kansas.

In United States District Court

Minutes of April 19th, 1946

April 19, 1946, at Fort Scott, Kansas, before Honorable Eugene Rice, United States District Judge Assigned.

Cornelius Roach appeared for Plaintiff, Douglas Hudson for Merchants Transfer and R. L. Letton for Trent. Plaintiff's motion to amend the return of service of summons issued September 7, 1945, is sustained, and said return of service is hereby amended to conform to the facts set forth in the findings of fact and conclusions of law filed by the Court. As amended the Court determines that the service is insufficient, and the motion of the defendant to quash is sustained. Plaintiff's motion to amend the return of service issued the 28th day of December, 1945, is sustained and the return is amended to conform to the findings of fact filed herein by the Court. The defendant's motion to quash said summons is overruled and the defendant is granted 20 days in which to answer or 10 days in which to plead.

(Plaintiff's Motion for New Trial was filed in the District Court April 27, 1946.)

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 8, 1946

Comes now The Merchants Transfer and Warehouse Company, a corporation, and for its answer herein alleges; [fol. 19] states and denies as follows, viz:

I

Defendant pleads the statutes of limitation of the State of Kansas, being the third sub-paragraph of Section 60-306, G.S. Kansas, 1935, and Section 60-308, G.S. Kansas, 1935, by which said sections of the laws of the State of Kansas the plaintiff's cause of action has been barred by limitations.

II

By way of further answer, this defendant states that under the laws of the State of Kansas, a cause of action for negligence such as set forth in plaintiff's petition becomes barred by the statutes of limitation of the State of Kansas two years after the date when the cause of action arises; that according to plaintiff's petition the cause of action herein arose on October 1, 1943; that plaintiff's petition (complaint) was filed on September 4, 1945; that a pretended summons was pretended to have been served on September 22, 1945, upon one Clarence M. Trent; that the said Clarence M. Trent was not at the time of the pretended service of said summons, and never had been, an officer, agent, employee or connected in any way with The Merchants Transfer and Warehouse Company, and that the said Clarence M. Trent was at no time the registered agent of said The Merchants Transfer and Warehouse Company, and was at no time in charge of any registered office of said corporation at 1201 North Broadway, Pittsburg, Kansas, or at any other address, as has been heretofore by this Court ruled.

III

This defendant further states that under the laws of the State of Kansas it was incumbent upon the plaintiff in order to toll the statute of limitations under and by virtue of the provisions of Section 60-308, G.S. Kansas, 1935, and other provisions of the Kansas statutes, that an attempt to commence an action must be followed by actual service of sum-

mons within 60 days, and this defendant states that no serv-
[fol. 20] ice was had upon this defendant within 60 days from and after the pretended service of summons above mentioned, but alleges that an alias summons was pretended to have been served on December 28, 1945, upon one Mrs. G. L. Sterling, designated as Secretary and Treasurer of Merchants Transfer & Warehouse Company, Inc., a corporation, although she was not any such officer of this defendant, The Merchants Transfer and Warehouse Company, a Kansas corporation.

IV

Defendant denies all of the allegations of plaintiff's petition for damages, except such as are hereinafter expressly admitted, and admits, denies and alleges in reference to the numbered paragraphs of plaintiff's petition herein seriatum as follows:

1. This defendant denies that Merchant Transfer & Warehouse Company, Inc., was at any time mentioned in plaintiff's petition a corporation organized and existing under and by virtue of the laws of Kansas; admits that plaintiff is a citizen and resident of Jackson County, Missouri, and admits that defendant, Clarence M. Trent, is and was a citizen of the State of Kansas; admits the matter in controversy exceeds $3,000 exclusive of interest and costs.

2. Defendant denies that Merchants Transfer & Ware— Company, Inc., was the owner of the truck mentioned in paragraph No. 2 of the complaint, and denies that George Ogan was the agent and employee of any such defendant, and denies that any such agent and employee was engaged within the scope of his employment for this defendant.

3. Defendant alleges that Clarence M. Trent purchased assets, property and business of The Merchants Transfer and Warehouse Company, a Kansas corporation, but denies that he purchased any such assets from Merchants Transfer & Warehouse Company, Inc., a corporation, and denies that Clarence M. Trent succeeded to any liabilities and obligations of this defendant if it is intended by the allegation of the complaint so to state and allege.

[fol. 21] 4. Defendant denies any allegations of negligence as set forth in paragraph No. 4 of the petition (complaint) and states the fact to be that if the plaintiff suffered any

damages in the collision mentioned in paragraph No. 4 such damages were caused by the negligence and carelessness of the plaintiff in negligently and carelessly driving and operating his Buick automobile over, on and into the truck then being driven by the agents of The Merchants Transfer and Warehouse Company at a time when the said truck of this defendant was on its right and proper side of the highway.

5. Defendant denies all allegations of negligence as set forth in paragraph No. 5, and states the fact to be that this defendant through its then agents operating its said truck was on the proper and right side of the highway, kept a good and careful lookout, was driving at a reasonable rate of speed, and that the plaintiff negligently and carelessly drove over, on and into the left side of the highway so far as the plaintiff was concerned by reason of the high, unreasonable and excessive rate of speed at which the plaintiff was proceeding and without keeping a proper and careful lookout by the plaintiff and in other ways failing to operate the automobile in which plaintiff was proceeding in a proper, careful and prudent manner.

6. This defendant denies the allegations of paragraph No. 6 as to the injuries claimed to have been suffered by the plaintiff, and as to property damage claimed by him to have been sustained, for the reason that this defendant is without knowledge of the nature and extent thereof, and asks strict proof of the nature and extent of the same.

Wherefore, having fully answered, this defendant prays that it go hence without day, and that it recover its costs as against the plaintiff.

Douglas Hudson, C. A. Burnett, Attorneys for The Merchants Transfer and Warehouse Company, a corporation.

[fol. 22] IN UNITED STATES DISTRICT COURT

MINUTES OF MAY 14, 1946

May 14, 1946. At Kansas City, Kansas, before Honorable Eugene Rice, United States District Judge Assigned.

Cornelius Roach appeared for Plaintiff and Douglas Hudson for Defendant. At 11:25 o'clock A.M., argument on

Plaintiff's Motion for a New Trial was made by Cornelius Roach. At 11:35 Argument presented for Defendant by Douglas Hudson. At 11:40 A.M., rebuttal argument made.

Whereupon, the Court denied Plaintiff's Motion for a new trial.

IN UNITED STATES DISTRICT COURT

PORTIONS OF PROCEEDINGS OF PRE-TRIAL CONFERENCE OF JUNE 17, 1946, BEFORE HON. ARTHUR J. MELLOTT. NARRATIVE FORM—Filed February 4, 1948

It was stipulated and agreed by counsel for plaintiff and counsel for Merchants Transfer & Warehouse Company, Inc., as to the following facts:

The accident out of which the lawsuit arose occurred October 1, 1943 in the State of Kansas.

Suit was filed in the District Court of the United States for the District of Kansas on September 4, 1945.

Summons was issued on September 7, 1945. (T-4.)

There was an attempt at service on September 24, 1945, but the return of service was subsequently quashed. (T-5.)

On December 28, 1945, an additional summons was issued and service had upon the Merchants Transfer & Warehouse Company, Inc., and a motion to quash that return of service was overruled. (T-5, 6.)

On October 30, 1945 a letter was written by Mr. Cornelius Roach to Mr. Douglas Hudson, enclosing a deposition notice and expressing the wish that Mr. Hudson should acknowledge receipt of a copy and return to Mr. Roach's office. [fol. 23] Under date of October 31, 1945, Mr. Douglas Hudson addressed a letter to Mr. Cornelius Roach, which was deposited in the mail on that date and received by Mr. Roach in due course, in which Mr. Hudson stated that he had forwarded to Senator A. J. Herrod, one of the attorneys of record for the plaintiff, a copy of the defendant's motion to quash service, and in which Mr. Hudson further stated that it was the position of Merchants Transfer & Warehouse Company, Inc., that it was not in the lawsuit. (T-6, 7.)

In his remarks to the Court, counsel for the plaintiff made the following statement:

"I concede—freely concede that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred but, on the other hand, I say that having been commenced in the Federal Court, the Federal rules apply and that it was commenced so as to toll the running of the Kansas Statute of Limitations in time." (T-11.)

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed June 19, 1946

Comes now the defendant, The Merchants Transfer and Warehouse Company, a corporation, and moves the Court for a summary judgment in its favor upon the pleadings herein and the admissions of the parties made at pre-trial conference on June 17, 1946, for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law.

Douglas Hudson, C. A. Burnett, Attorneys for Defendant, The Merchants Transfer and Warehouse Company, a corporation.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PARTS OF ANSWER OF DEFENDANT MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC.—Filed June 27, 1946

Comes now plaintiff and moves that Paragraphs I, II, and III of Answer of defendant Merchants Transfer & Warehouse Company, Inc. be stricken for the reason that upon the pleadings and admissions of the parties made at pre-trial conference on June 17th, 1946, said paragraphs constitute no defense to plaintiff's complaint.

Wherefore, plaintiff prays the judgment of the Court.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR SUMMARY JUDGMENT, ETC.
—Filed October 21, 1946

Good cause appearing therefore and for the reasons set out in a memorandum opinion this date entered herein, it is by the Court

Ordered that the defendant's Motion for Summary Judgment be, and it hereby is, denied. It is further

Ordered that plaintiff's Motion to Strike Paragraphs I, II and III of the defendant's answer be, and it hereby is, sustained.

Dated at Kansas City, Kansas this 18th day of October, 1946.

Arthur J. Mellott, District Judge.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed October 21, 1946

Mellott, District Judge: Defendant has filed a Motion for Summary Judgment and Plaintiff has filed a Motion [fol. 25] to Strike Paragraphs I, II and III of Defendant's answer. Both motions raise essentially the same question. Stated generally it is whether the action had been "commenced" before the bar of the statute of limitations had fallen.

Briefly stating the facts disclosed by the record and as to which there is no dispute between the parties, a complaint was filed in this Court on September 4, 1945 praying judgment for $76,116.48 for personal injuries and damage to property, alleged to have been sustained as the result of a collision between two motor vehicles on October 1, 1943. Summons was issued on September 7, 1945; but Motion to Quash Service was sustained. Alias summons was issued December 28, 1945 and served on that date. A Motion to Quash the return of service upon the alias summons has been overruled.

The issue presented is whether Rules 3 and 4 of the Federal Rules of Civil Procedure or the general statutes of limitation of the State of Kansas are to be applied. Under Section 60-301 et seq. of the General Statutes of Kansas

for 1935 an action such as this—for injury to the rights of another, not arising on contract (Sec. 60-306 id.)—can only be brought within two years after the cause of action shall have accrued. Action may be "commenced * * * by filing * * * a petition and causing a summons to be issued thereon." (Sec. 60-301 id.) An action is "deemed commenced," as to each defendant, at the date of the summons which is served on him or on a codefendant united in interest with him. An attempt to commence an action is to be "deemed equivalent to the commencement thereof * * * when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by * * * service of the summons within sixty days." (60-308 id.) Thus under the present facts it is probably true, as contended by the defendant, that the action was not "commenced" within two years after the cause of action accrued: So if it had been instituted in one of the State Courts a motion to dismiss would lie. The Federal Rules, however, make no requirement that service of the summons be made within sixty days nor do they prescribe that "causing a summons to be issued" is a prerequisite to the "com-[fol. 26] mencement" of a civil action. Rule 3 provides that "A civil action is commenced by filing a complaint with the Court." Thus the question evolves is whether the Federal Rule or the state statute is to be applied.

The defendant urges that the law of the forum determines the remedy and hence the applicable limitation; that the right to maintain the action is a substantive right of a litigant which may neither be abridged, enlarged nor modified by rule of Court; that the action was not actually "brought" within the two year period inasmuch as the summons had not been served within sixty days after the petition had been filed; and that the effect of sustaining plaintiff's present position would be to sweep away all of the various conditions of the statutes of limitation of the several states. Plaintiff, while inferentially conceding that a State Court would dismiss the present action because barred by the statute of limitations, insists that both Section 60-301 of the Kansas Statute and Rule 3 of the Federal Rules are merely procedural and do not affect the substantive rights of the litigants.

No decided case has been cited or found in which the precise question has been determined. The right answer is elusive. Conflicting views have been expressed by authors

of Law Review articles, as is indicated in the footnote under Rule 3 in U.S.C.A. Title 28 following § 723 c. The Honorable William D. Mitchell, who had a prominent part in the preparation of the rules, in a lecture delivered to the Brooklyn Law School in October of 1938 said:

Does the commencement of a suit in the Federal Courts, as defined in the Rule (rule 3) operate to stay the running of a state statute of limitations? That may or may not be a matter of substantive law. The question is dealt with in Note 4 to Rule 3. As a practical matter it may not arise, because by Rule 4 (a) the clerk is required, as soon as complaint is filed, to issue summons and deliver it to the marshal for service.

Note 4 to the Rule is as follows:

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4 (a) this is to be [fol. 27] followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether if is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights to vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Notwithstanding the hopefulness of the committee the question has arisen. What, then, is the correct answer? Perhaps it is suggested by the language of the Circuit Court of Appeals for this (the 10th) Circuit in the recent case of Isaaks v. Jeffers, (144 Fed. (2d) 26, 28, certiorari denied 323 U. S. 781.

• • • the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are

governed by the law of the forum in which the action is instituted.

Defendant correctly points out that the Court, in the cited case, was not dealing with the precise question here presented and insists that there is a distinction between "commencing" an action for general purposes and "commencing" it for the purpose of avoiding the statute of limitations. That there is a distinction cannot be gainsaid, which, of course, adds to the perplexity of the problem. This Court is of the opinion, however, that since the action was "commenced," within the purview of Rules 3 and 4 before it was barred by any statute of limitations it would err in sustaining defendant's Motion for Summary Judgment. If the Court is correct in this conclusion, then the allegations in Paragraphs I, II and III of defendants an-[fol. 28] swer constitute no defense and should be stricken. Orders are therefore being entered denying the defendant's Motion for Summary Judgment and sustaining plaintiff's Motion to Strike Paragraphs I, II and III of the answer.

In United States District Court

Motion for Summary Judgment—Filed April 21, 1947

Comes now the defendant, The Merchants Transfer and Warehouse Company, a corporation, and moves the Court for a summary judgment in its favor upon the pleadings herein and the admissions of the parties made at pre-trial conference on June 17, 1946, for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law.

Douglas Hudson, A. B. Keller, Attorneys for Defendant, The Merchants Transfer and Warehouse Company, a corporation.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER—Filed May 16, 1947

Mellott, District Judge: The Court has given consideration to what appear to be alternative requests of the parties, somewhat obliquely presented, that it now unsettle the law questions which have heretofore been settled.[1] A brief recitation of the proceedings heretofore had and orders made will not be amiss.

A "Petition for Damages"—complaint—was filed September 4, 1945 in this Court, seeking $76,116.48 for injuries [fol. 29] alleged to have been sustained on or about October 1, 1943. On September 7, 1943 summons was issued. Motion to quash the summons was filed and ultimately sustained by Honorable Eugene Rice of the Eastern District of Oklahoma, Judge Assigned.[2] Alias summons was issued and returned, the return was amended upon plaintiff's motion, the defendant's motion to quash was overruled and the defendant was granted twenty (20) days in which to answer or ten (10) days in which to plead. "Motion for New Trial" was filed by plaintiff, the issue raised (the correctness of the order quashing the service of the original summons) was briefed and argued orally before Judge Rice and on May 14, 1946 was denied.[2] Answer was filed on May 8, 1946. Pre-Trial Conference was held before the author of this opinion on June 17, 1946, at which the parties discussed the general question whether defendant's Motion for Summary Judgment should be sustained "for the reason that there is (because of the admissions made at the pre-trial conference) no genuine issue as to any material fact in relation to the applicability of the statute of limitations," or whether the paragraphs of the answer raising the same issue should be stricken on the motion of the plaintiff. The issue thus squarely tendered was argued orally to the Court, was briefed by both parties and resolved generally in favor of

---

[1] Cf. In Re Walton Hotel Co., 116 F. (2d) 110; United States v. 21815 Square Feet of Land, Etc., 52 F. Supp. 707; Mason Line v. Green, 6 F. R. D. 470.

[2] See opinion filed herein April 13, 1946.

the plaintiff, the reasons being monumented in an opinion filed herein.[3]

The matters now before the Court, as indicated above, stem from another Motion for Summary Judgment filed by the defendant, together with briefs in support thereof and an informal application to the Court to set aside its opinion and order of October 21, 1946. Notwithstanding the irregularity of filing a second Motion for Summary Judgment without leave of Court first being secured, the Court set the matter for oral argument, at which the plaintiff suggested: First, that the Court's original ruling was correct; Second that in any event it has become the settled law of the case; and Third, that if any proceedings are now to be taken to overturn the orders heretofore made, this Court [fol. 30] should now re-examine the issue passed upon by Judge Rice, set it aside as not in conformity with established legal principles and thereby render moot the order of this Court entered on October 21, 1946.

The Court is of the opinion that the orderly dispatch of its business dictates that the law of the case, as settled by the orders above referred to, should not now be disturbed, notwithstanding further study of the questions presented should leave some doubt in its mind as to whether either or both of them should have been decided differently. In that view, the Court passes without further discussion plaintiff's argument that Judge Rice's findings and conclusions clearly show that the defendant corporation was served within two years of the accrual of the cause of action by leaving a copy of the summons and petition at its registered office as required by the Statutes of Kansas and hence that his order quashing the service was erroneous, and it also respectfully declines to set aside its order of October 21, 1946, notwithstanding the additional argument now submitted by learned counsel for the defendant. It is therefore now by the Court

Ordered that the Motions and Requests of the parties, briefly alluded to herein, be and they thereby are, denied. Inasmuch as some of the requests are contained in documents which have not been filed formally in this cause and to the end that the record may be complete, it is now by the Court

---

[3] See Memorandum Opinion and Order filed and entered October 21, 1946.

Ordered further that the letters and briefs heretofore transmitted to the Court, which have been attached together, now be filed herein.

Dated at Kansas City, Kansas this 16th day of May, 1947.

Arthur J. Mellott, District Judge.

(Amendment to answer of Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, filed in the District Court November 18, 1947.)

[fol. 31] In United States District Court

Verdict—Filed November 18, 1947

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess damages at $13,425.00.

W. F. Harlow, Foreman.

In United States District Court

Journal Entry of Judgment—Filed January 20, 1948

On this 17th day of November, 1947, the same being a regular judicial day of the regular November, 1947, term of the Third Division at Fort Scott, Kansas, this case comes regularly on to be heard upon the docket of this Court.

Plaintiff, Julius Ranny Ragan, present by Cornelius Roach and D. L. Brenner, his attorneys. Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, present by Douglas Hudson and Douglas G. Hudson, its attorneys.

Thereupon, both parties announce ready for trial.

Thereupon, the plaintiff, Julius Ranny Ragan, dismisses the case as against Clarence M. Trent, d/b/a Trent Truck Lines, and the case proceeds to trial upon the issues made as between Julius Ranny Ragan, plaintiff, and Merchants Transfer & Warehouse Company, Inc., a corporation, defendant.

Thereupon, a jury possessing the qualifications required by law, was duly impaneled, sworn to well and truly try the issues joined.

Thereupon, the plaintiff and defendant make their opening statements to the jury and the trial proceeds with the introduction of evidence upon behalf of the plaintiff.

Thereupon, and at the hour of 5 o'clock P. M., plaintiff not having concluded his evidence, the Court adjourns the further trial of the case until November 18, 1947, at 10 o'clock A. M.

[fol. 32] On this November 18, 1947, at 10 o'clock A. M., trial resumes pursuant to adjournment.

The plaintiff introduces additional evidence and rests.

Thereupon, the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, moves to dismiss the case on the ground that the evidence and record show as a matter of law that the plaintiff cannot recover, which motion was by the Court overruled.

Thereupon, the defendant introduces its evidence and rests.

Thereupon, the plaintiff introduces his evidence in rebuttal and rests.

Thereupon, the defendant requests the Court to charge the jury as per written requests presented and filed, a part of which requested charges to the jury by the defendant were denied.

Thereupon, the case is argued to the jury by respective counsel.

Thereupon, the Court charges the jury as to the law of the case.

Thereupon, the jury retires in charge of a sworn bailiff to consider of its verdict.

Thereupon, the jury returns into Open Court and returns its verdict in favor of the plaintiff, Julius Ranny Ragan, and against the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the sum of $13,425.00, and said verdict is filed and approved.

Upon the verdict of the jury, the Court finds, and it is considered, ordered and adjudged that plaintiff, Julius Ranny Ragan, shall have and recover of and from the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, said sum of $13,425.00 and the costs of this action.

Eugene Rice, United States District Judge Assigned.

[fol. 33] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed November 25, 1947

Comes now the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, and moves the Court to grant a new trial herein for the following reasons:

1. There was no substantial evidence to support the judgment.

2. The verdict herein was a quotient verdict, which was arrived at by adding together the estimate of each of the twelve jurors and dividing the same by twelve.

3. The judgment is contrary to law in that the action was barred by the statute of limitations of the State of Kansas applicable thereto as shown by the following facts:

(a) The collision out of which the injuries arose occurred on October 1, 1943.

(b) The petition was filed herein on September 4, 1945.

(c) Summons was issued on September 7, 1945; attempted service of summons was made upon the defendant on September 24, 1945.

(d) The pretended service of September 24, 1945, was quashed.

(e) An alias summons was issued December 28, 1945, and was served on December 28, 1945.

(f) The applicable statute of limitations are sub-paragraph "Third" of Section 60-306, G. S. Kansas, 1935, and Section 60-308 G. S. Kansas, 1935.

4. Error in refusing to give charge to the jury as requested by the defendant.

5. Error in exclusion of evidence offered by defendant.

6. Error in overruling the defendant's motion to dismiss at the termination of the plaintiff's evidence.

The verdict herein was rendered under the influence of passion, sympathy and prejudice and was against the weight of the evidence.

[fol. 34] 8. Newly discovered evidence material to the defendant which the defendant could not with reasonable diligence have procured at the time of the trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a Corporation.

(Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment was filed by Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the District Court on December 19, 1947.)

(Motion for leave to filed and present "Motion to Vacate Judgment and Enter Judgment for the Defendant Upon Its Motion for Summary Judgment," was filed by Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, in the District Court on December 23, 1947.)

(Plaintiff's Motion for Leave to File and Present Motion to Vacate Order Sustaining Motion to Quash Service of Original Summons and to enter an Order Overruling Such Motion to Quash was filed in the District Court on January 8, 1948.)

(Plaintiff's Motion to Vacate Order Entered April 19, 1946, Sustaining Defendant's Motion to Quash Service of Summons Upon the Defendant and to Enter an Order Overruling Such Motion to Quash was filed in the District Court on January 8, 1948.)

In United States District Court

Journal Entry of Order Overruling Motion for New Trial etc.—Filed January 23, 1948

On this 9th day of January, 1948, at Kansas City, Kansas, before Honorable Eugene Rice, District Judge As-[fol. 35] signed, before whom this case was tried at Fort Scott, Kansas, on November 17 and 18, 1947, (Honorable Arthur J. Mellott, District Judge for the District of Kansas sitting with him) this case comes on to be heard upon the motion for new trial filed herein by the defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, upon the motion of said defendant for leave to file and

present "Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment," and upon Plaintiff's "Motion for leave to file and present motion to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash."

Plaintiff, Julius Ranny Ragan, present by Cornelius Roach, his attorney. Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation, present by Douglas Hudson and Douglas G. Hudson, its attorney.

Thereupon, the defendant asked and obtained leave to withdraw without prejudice its "Motion for judgment notwithstanding verdict" filed herein on November 25, 1947, which leave so to do was granted.

Thereupon, the motions were argued by respective counsel, leave having been granted by Honorable Arthur J. Mellott sitting in these matters for consideration as a part of the motion for new trial the matters and things therein set forth by the defendant relating to the applicability of the statute of limitations of the State of Kansas.

Thereupon, the argument having been concluded, the Judges declare a recess, and at the Conclusion of the recess both of said Judges being again sitting, the Court finds, and it is considered, ordered and adjudged that the motion for new trial filed by the defendant be and is overruled; that the defendant's motion for leave to file and present "Motion to vacate judgment and enter judgment for the defendant upon its motion for summary judgment," be overruled, and the plaintiff's "Motion for leave to file and present motion to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash" be overruled.

[fol. 36] The hearing of these motions at Kansas City, Kansas, in the First Division was accepted and agreed to by both parties and it was further agreed that the journal entry and journal entries herein, when approved by attorneys for both parties, may be signed by the Honorable Eugene Rice outside the District of Kansas, and transmitted to the Clerk at Fort Scott, Kansas.

Eugene Rice, United States District Judge Assigned.

Arthur J. Mellott, United States District Judge.

In United States District Court

Defendants' Notice of Appeal—Filed January 26, 1948

Notice is hereby given that Merchants Transfer & Warehouse Company, Inc., a corporation, defendant above named, does hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the following orders and judgment entered by the District Court of the United States for the District of Kansas, Third Division:

1. The order of October 18, 1946 overruling this defendant's motion for summary judgment.

2. The order of October 18, 1946 sustaining the plaintiff's motion to strike Paragraphs I, II and III of the Answer.

3. The final judgment entered herein on November 18, 1947.

4. The order of January 9, 1948 overruling the defendant's motion for a new trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation.

[fol. 37] (Appeal bond, in the sum of $250.00 with The Western Casualty and Surety Company as surety, was filed by Appellant in the District Court January 26, 1948.)

In United States District Court

Plaintiff's Notice of Appeal—Filed February 13, 1948

Notice is hereby given that Julius Ranny Ragan, Plaintiff above named, does hereby appeal to the Circuit Court of Appeals for the Tenth Circuit from the following orders and judgments entered by the District Court of the United States for the District of Kansas, Third Division:

1. The order of April 19, 1946, sustaining defendant's motion to quash service of the original summons.

2. Order of the District Court of January 9, 1948, overruling plaintiff's motion for leave to file and present motion

to vacate order sustaining motion to quash service of original summons and to enter an order overruling such motion to quash as shown by journal entry filed January 23, 1948.

3. Order of the District Court of January 9, 1948, overruling plaintiff's motion to vacate order entered April 19, 1946, sustaining defendant's motion to quash service of summons upon the defendant and to enter an order overruling such motion to quash.

Cornelius Roach, A. J. Herrod, Attorneys for Plaintiff.

(Appeal bond, in the sum of $250.00 with Central Surety and Insurance Corporation as surety, was filed by Appellee in the District Court February 13, 1948.)

IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed February 4, 1948

Comes now Merchants Transfer and Warehouse Company, Inc., a corporation, the defendant in the above [fol. 38] entitled action, and for its statement of points on which it intends to rely on appeal, states as follows:

The District Court erred in ruling that the plaintiff's cause of action was not barred by the statute of limitations of the State of Kansas, the applicable statutes being sub-paragraph Third of Section 60-306, G. S. Kan. 1935, and Section 60-308, G. S. Kan. 1935.

This error occurs in the order of the District Court of October 18, 1946, overruling this defendant's motion for summary judgment; in the order of October 1st, 1946 sustaining plaintiff's motion to strike paragraphs 1, 2 and 3 of the answer; in the final judgment entered herein on November 18, 1947; and in the order of January 9, 1948 overruling the defendant's motion for a new trial.

Hudson & Hudson, by Douglas Hudson, Attorneys for Defendant, Merchants Transfer & Warehouse Company, Inc., a corporation.

Service of the above motion made on plaintiff by mailing to Cornelius Roach, Commerce Building, Kansas City 6, Missouri, his attorney of record, a copy of said motion this February 4, 1948.

Douglas Hudson.

IN UNITED STATES DISTRICT COURT

APPELLEE'S STATEMENT OF POINTS ON APPEAL—Filed February 13, 1948

Comes now Julius Ranny Ragan, plaintiff in the above entitled cause, and for his statement of points on which he intends to rely on appeal, states as follows:

The District Court erred in sustaining defendant Merchants Transfer & Warehouse Company's motion to quash service of original summons and in refusing to hold that the defendant Merchants Transfer & Warehouse Company was duly and regularly served with summons on September 22, 1945, by the leaving of the original summons at the [fols. 39-40] regist red office of the defendant at 1201 North Broadway, Pittsburg, Kansas.

This error occurs in the order of the District Court of April 19, 1946, sustaining defendant's motion to quash the service on original summons; in the order of the District Court entered January 9, 1948, overruling plaintiff's motion for leave to file and present a motion to vacate the order sustaining defendant's motion to quash the service on original summons; and in the order of the District Court entered January 9, 1948, overruling plaintiff's motion to vacate the order entered April 19, 1946, sustaining defendant Merchants Transfer & Warehouse Company's motion to quash service of original summons, and to enter an order overruling such motion to quash.

Cornelius Roach, D. L. Brenner, A. J. Herrod, Attorneys for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

RECORD ENTRY; CAUSE ARGUED AND SUBMITTED

Second Day, September Term, Tuesday, September 14th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard and were argued by counsel, Douglas Hudson, Esquire, appearing for Merchants Transfer & Warehouse Company, Inc., and Cornelius Roach, Esquire, appearing for Julius Ranny Ragan.

Thereupon these causes were submitted to the court.

IN UNITED STATES COURT OF APPEALS

Douglas Hudson (Howard Hudson and Douglas G. Hudson, were with him on the brief) for Appellant in Number 3657, and for Appellee in Number 3658. Cornelius Roach (Daniel L. Brenner, Wilfred Wimmell and A. J. Herrod, were with him on the brief) for Appellee in Number 3657, and for Appellant in Number 3658.

Before Phillips, Chief Judge and Huxman and Murrah, Circuit Judges

OPINION—November 9, 1948

HUXMAN, Circuit Judge, delivered the opinion of the court:

In Number 3658, Julius Ranny Ragan, plaintiff below, has appealed from an order of the trial court quashing the original service of summons, and in Number 3657, the defendant, the Merchants Transfer and Warehouse Company, has appealed from the order of the trial court denying its motion for summary judgment. The parties will be referred to respectively as "Ragan" and "the company."

The essential facts, briefly stated, are these. Ragan in- [fol. 42] stituted an action for damages against the company in the District Court of the United States for the District of Kansas. The automobile collision on which the action was predicated occurred October 1, 1943. Ragan's complaint was filed September 7, 1945. A summons was issued

September 7, 1945, and was served by a Deputy United States Marshal on September 22, 1945. The Marshal's return of the service of summons is as follows:

"I hereby certify and return, that on the 22nd day of Sept., 1945, I received the within summons at Wichita, Kansas and served The Merchants Transfer and Warehouse Company by delivering a true copy thereof to Clarence M. Trent personally.

"Served Clarence M. Trent personally at Pittsburg, Kansas on Sept. 22, 1945.

"At the same time and in like manner I served each of the within named with a copy of the Petition for Damages filed in this case.

"W. M. Lindsay, United States Marshall, by Repps H. Campbell, Deputy U. S. Marshal.

"Filed September 27, 1945."

A motion to quash this service of summons was filed by the company on October 12, 1945. While this motion was pending and on December 28, 1945, an alias summons was issued. On December 28, 1945, the same Deputy United States Marshal made the following return of service of this summons:

"I hereby certify and return, that on the 28th day of Dec., 1945, I received the within summons at Ft. Scott, Kansas and served The Merchants Transfer and Warehouse Company, Inc. a Corporation by delivering a true copy thereof to Mrs. G. L. Sterling personally, she being the Secretary and Treasurer of the Merchants Transfer Company, Inc. a Corporation at the hour of 5:45 P. M. at 503 [fol. 43] South Broadway Street at Pittsburg, Kansas on December 28, 1945.

"At the same time and in like manner I served the within named with a copy of the complaint filed in this case.

"W. M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy U. S. Marshal.

"Filed January 7, 1946."

A motion was filed by the company to quash the service of this alias summons. The two motions were heard and disposed of at the same time. At the hearing, the trial court permitted an amendment to the Marshal's return of

service of the original summons to the effect that at the time of the service of the original summons, as set out in the return, the Deputy Marshal inquired of Trent concerning the officers of the corporation; that Trent replied they were a couple of aged women whose address he was not able to give; that the Deputy Marshal did not know the address of Mrs. G. L. Sterling at that time, and that thereupon the Deputy Marshal left the summons with Trent for the company. After permitting this amendment, the trial court sustained the motion to quash the service of the original summons and overruled the like motion addressed to the alias summons. Thereafter the company filed a motion for summary judgment on the ground that the cause of action, if any, was barred by the applicable statute of limitations. This motion was overruled. Thereafter the cause was tried to a jury resulting in a verdict for Ragan. A motion for a new trial was overruled and judgment was entered on the verdict. This appeal followed.

In view of the conclusions we have reached on the two questions outlined above, other issues which are raised by the appeal become immaterial and further reference to such issues or the evidence relating thereto will be omitted from the opinion.

[fol. 44] Number 3658

As outlined above, the only question presented by this appeal is whether the trial court erred in quashing the service of the original summons. The Kansas Statute, Sec. 60-2518, 1943 Supplement to the General Statutes of Kansas, 1935, relating to service of corporations, provides as follows:

"A summons against a corporation may be served upon the president, resident agent, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof, or by the delivery of a copy at the registered office of the corporation, or to the registered agent of the corporation."

Trent was not an officer of the corporation and was not its registered agent. For the purpose of this opinion, it

will be assumed that 1201 North Broadway, Pittsburg, Kansas, where this service was made, was the resident office of the company.

It will be observed that the statute sets out in sequence those upon whom service shall be made. It is only if none of those can be found that a copy may be left at the registered office. It is incumbent upon the officer making service to exercise diligence in seeking to ascertain whether those upon whom service must first be made can be found before he serves those subsequent in the order of service.

Ohio has a statute relating to service on corporations, which, so far as necessary to the question under consideration, is not materially different from the Kansas Statute. This statute is set out in Sunday Creek Coal Co. v. West, 192 N. E. 284, 86. Concerning the requirement to constitute [fol. 45] valid service under the third provision thereof,[1] the court said:

"Before a sheriff may resort to the manner of service provided in the 3rd provision of this statute, he should make a reasonable effort to ascertain if an officer 'can be found' in the county upon whom service may be made."

In the early case of Palmetto Town Company v. Rucker, 1 Kans. 561, the Kansas Supreme Court clearly indicates that service must be made in the order of sequence set out in the statute. The court said:

"It is contended that the return of the officer who served the summons should have shown that the president, or other chief officer, could not be found in the county, to render the service, as made on the secretary, legal. This position of practice we consider is the proper one, and should be observed, in order to a full compliance with the statute. In the absence of the president, or other chief officer, a service on the secretary would be, in law, good."

In the syllabus of the case, the court states:

"When a summons is served on the secretary of a corporation, the return should state that the president or other

---

[1] The 3rd provision provides:

"* * * or if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof."

chief officer was absent from the county, or could not be found."

While the Palmetto case does not in so many words say that the officer making service must exercise due diligence in ascertaining whether those who must first be served can be found before service is made upon those subsequently named in the statute, the language of the court that the return must state that such persons "could not be found" [fol. 46] implies the exercise of due diligence in ascertaining that fact before substitute service is made.[2]

The return of the Deputy Marshal, as amended by the findings of the trial court, merely shows that none of the officers of the company were at this resident address; that the serving officer inquired of Trent about the officers of the corporation and was informed that they were a couple of aged women whose address Trent was not able to give. The return does not state that the officers could not be found or that any effort was made to find them, other than the inquiry about the officers' address to Trent. The conclusion is inescapable that there was a lack of due diligence in seeking to ascertain whether those upon whom service must

---

[2] Under similar statutes, it has generally been held that the return must show diligence in serving those first required to be served.

Hoen v. The Atlantic and Pacific Railroad Co., 64 Mo. 561;
Dixon v. The Hamm and St. Joe R. R. Co., 31 Mo. 407;
Cunningham v. Rorer Mill & Elevator Co., (Okla.) 105 Pac. 676;
Empire Refineries v. AT&SF, (Okla.) 217 Pac. 160;
Collins v. American Spirit Mfg. Co., (CC Ill.) 96 Fed. 133;
Shawnee Gas & Electric Co. v. Griffith, (Okla.) 222 Pac. 235;
Boston Acme Mines Development Co. v. Clawson, (Utah) 240 Pac. 165;
St. Louis & S. F. R. Co. v. Reed, (Okla.) 158 Pac. 399;
Tioga Coal Corp. v. Silman, (W. Va.) 22 S. E. 873;
Cherry Lake Farms v. Love, (Fla.) 176 So. 487.

Remark: The Oklahoma Statute for service upon a corporation is very similar to the Kansas Statute.

be made, could be found, before service was attempted by leaving a copy of the summons at the residence office.

Number 3657

The only question in this appeal is whether the action was barred by the applicable Kansas statute of limitations. Under Section 60-306, Gen. Statutes for Kansas, 1935, an action such as this must be brought within two years after it has accrued.

Section 60-301, Gen. Statutes for Kansas, 1935, provides that:

"A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

[fol. 47] Rule 3, Federal Rules of Civil Procedure, provides:

"A civil action is commenced by filing a complaint with the court."

Rule 4, Federal Rules of Civil Procedure, provides:

"(a) Summons: Issuance. Upon the filing of a complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff, separate or additional summonses shall issue against any defendants."

It is quite well settled that the manner and method to be followed in commencing actions is procedural and is controlled by the laws of the forum in which the action is filed.[3]

But in any event, the filing of the complaint on September 4, 1945, and the issuance of the summons and placing it in the hands of the officer for service on the same day, constituted full compliance with the procedural steps of both the state and federal law for the commencement of the action. But whether compliance with the procedural steps for the commencement of an action is sufficient to toll the statute of limitations presents an entirely different ques-

---

[3] Isaacs v. Jeffers, 144 Fed. (2d) 26, and cases cited therein;
Bomar v. Keyes, 162 Fed. (2d) 136;
Robinson v. Waterman S. S. Co., 7 F. R. D. 51.

tion. While there has been much debate and much disagreement among law writers as to whether statutes of limitation are procedural or substantive, the policy of the federal law as laid down in Guaranty Trust Co. v. York, 326 U. S. 99, is that the outcome of litigation in diversity cases in the federal courts should be substantially the same as if the case had been filed in the state court. Thus, the court says:

"The nub of the policy that underlies Erie R. Co. v. Thompkins is that for the same transaction the accident [fol. 48] and again,

of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

"Plainly enough, a statute that would complet-ly bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."

and finally, the court said:

"Certainly, the fortuitous circumstances of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."

When we look to the State law it becomes obvious that this action could not have been maintained in the State court. In fact in a pre-trial conference, Ragan's attorney stated that:

"I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred . . . "

The law of Kansas as to the necessary steps that will toll the running of the statute of limitations is materially different from that of a majority of the states. Section 60-308 Gen. Statutes for Kansas, 1935, provides:

[fol. 49] "An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

Kansas has consistently held, beginning with the early case of Dunlap v. McFarland, 25 Kan. 488, that Section 308 above has application only to the statute of limitations.[4]

The meaning of Section 308 is as though it read substantially as follows:

"An action for the purpose of tolling the statute of limitations shall be deemed commenced as to each defendant as of the date on which the summons is served on him * * *"

This is the construction placed on this section by the Kansas Supreme Court. In Green v. McCracken, supra, the court said:

"To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in Section 20 of the code."

---

[4] See also Bannister v. Carroll, 22 Pac. 1012;
Webster v. Long, 66 Pac. 1032;
Green v. McCracken, (Kans.) 67 Pac. 857;
State of Kansas v. Alexander, 114 Pac. 241;
Brock v. Francis, 131 Pac. 1170.

And in State of Kansas v. Alexander, supra, where service was by publication, the court said:

"But such service of publication must be had before the limitation has run in order to keep the cause of action alive."

[fol. 50] An analysis of the Kansas decisions leaves no doubt that an action such as this is barred unless commenced by the filing of an action and the issuance of summons and service thereof on the defendant, all within the two-year period, or the issuance and service of an alias summons upon the defendant within sixty days of the expiration of the two-year period where no service was obtained on the original summons.

Our holding here is consistent with what we said in Isaacs v. Jeffers, 144 Fed. (2d) 26. The New Mexico Statute of Limitations differs materially from that of Kansas. It required only that the kind of action under consideration there be brought within four years. We held that the time within which the action must be brought or filed to toll the statute of limitations was controlled by New Mexico law, but that the manner in which it was brought or filed was procedural and in the federal court was controlled by its rules of procedure. We accordingly held that since the action in that case was brought within the time fixed by the New Mexico Statute in the manner provided by the Federal Rules of Procedure, the statute was tolled.

So, in this case, we must likewise give full effect to the Kansas Statute of Limitations which requires not only that an action be brought within two years, but also that service of summons must be had within that time, or in the case of an alias summons, within sixty days thereafter, in order to toll the statute. Since this was not done, the action was barred by the Kansas Statute of Limitations.

The judgment of the trial court appealed from in Number 3658 sustaining the motion to quash the original summons is Affirmed, and its judgment in Number 3657, overruling the motion for summary judgment by the defendant is Reversed, and the cause in this appeal is remanded with directions to sustain the motion for summary judgment.

It is so Ordered.

[fol. 51] IN UNITED STATES COURT OF APPEALS

JUDGMENT

Thirty-fourth Day, September Term, Tuesday, November 9th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause overruling the motion for summary judgment by the defendant be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to sustain the motion for summary judgment; and that Merchants Transfer & Warehouse Company, Inc., a corporation, appellant, have and recover of and from Julius Ranny Ragan, appellee, its costs herein and have execution therefor.

On November 18, 1948, an order was entered extending the time for a petition for rehearing for an additional ten days.

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed December 6, 1948

Comes now appellee and moves the Court to grant a rehearing in this cause, and as grounds for said petition states as follows:

I

The Court inadvertently overlooked the fact that the Federal Rules of Civil Procedure have the status of acts of Congress, and that any state statute in conflict therewith must give way.

[fol. 52]

II

The Court has inadvertently misunderstood the effect of the case of Guaranty Trust Company v. York, 326 U. S. 99,

III

The Court inadvertently misinterprets the nature of Section 60-308, General Statutes of Kansas, 1935, when it says that this is an integral part of the Statute of Limitations of Kansas, and hence a part of the substantive law of the State.

Wherefore, Appellee prays the Court for a rehearing in said cause.

Respectfully submitted, Cornelius Roach, Daniel L. Brenner, Wilfred Wimmell, A. J. Herrod, Attorneys for Appellee.

Affidavit

STATE OF MISSOURI,
County of Jackson, ss:

Cornelius Roach, of lawful age, being first duly sworn, upon his oath states that he is counsel for Appellee in the above entitled cause, and that the petition for rehearing of the cause is filed in good faith and believed to be meritorious, and that it is not filed for the purpose of vexation or delay.

Cornelius Roach.

Subscribed and sworn to before me, a notary public, this 4th day of December, 1948. Sadie L. Torbell, Notary Public. My commission expires: Dec. 9, 1948. (Seal.)

This petition served by depositing a copy thereof in the post office, postage prepaid, addressed to counsel for Appel- [fols. 53-54] lants at their post office address, this 4th day of December, 1948.

Cornelius Roach.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING

Eleventh Day, November Term, Friday, December 17th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court. On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

On December 27, 1948, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Daniel L. Brenner, File No. 53,524, U. S. Court of Appeals, Tenth Circuit, Term No. 522, Julius Ranny Ragan, Petitioner, vs. Merchants Transfer & Warehouse Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed January 25, 1949. Term No. 522 O. T. 1948.